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Supreme Court of the United States

October Term, 1965

No. 1282

NOREN HARVEY, an Infant, and BIVENNE HARVEY, an Infant, by their Guardian *ad Litem*, TUCK HARVEY, and HEIDI and TUCK HARVEY, Individually,

Petitioners,

against

CHEMIE GRUNENTHAL, G.m.b.H.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CHEMIE GRUNENTHAL, G.m.b.H.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Did the courts below, in this diversity action originating in the Southern District of New York, properly dismiss the complaint for lack of jurisdiction over the person of the foreign corporate defendant on the basis of New York statutory law, which, by its terms and as construed by the highest court of the state, precludes personal jurisdiction over non-domiciliaries neither doing business within the state nor having performed within the state any act giving rise to the claims sought to be asserted?

Statement of Case

Respondent, Chemie Gruenenthal G.m.b.H. ("Gruenenthal"), the defendant in this action, is a limited liability company (Gesellschaft mit beschraenkter Haftung) of the

Federal Republic of Germany engaged in the manufacture and sale of pharmaceutical products in West Germany (P. App. 4).*

In a prior proceeding between the parties in 1962 petitioners admitted that Gruenenthal had "no office, place of business or agency" nor a "known * * * agent" in New York (D. App. 3a, 25a). In fact, Gruenenthal was never engaged in business in that state (P. App. 4-5).

At the time of the service of the instant summons and complaint in September 1963, Gruenenthal had been without any contacts of any kind whatsoever with the United States, let alone the State of New York, for about two years.

Prior to that time, between 1952 and 1961, Gruenenthal had had a few sporadic dealings with parties in this country in relation to the filing of patent and trademark registration applications, the negotiation of six licenses for the use of American patents in Germany and the grant of a single license to an American concern for use of one of Gruenenthal's patents (P. App. 4-8, 31-33). During this period, in connection with these transactions, Gruenenthal used New York patent counsel, and occasionally some Gruenenthal personnel visited the United States (P. App. 6-7).

Except for the fact that, in connection with the one license it granted in the United States, Gruenenthal had shipped from Germany to its licensee in Ohio a single consignment of chemical material to be used in developing the licensed product, which merchandise was transhipped in

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* "P. App." refers to the bound volume entitled "Papers on Appeal from Order" filed by petitioners as plaintiffs-appellants in the court below. "D. App." indicates the appendix to the brief filed by respondent in the court below, in which it was defendant-appellee. "Pet." is used to designate the instant petition and "Op." to refer to the opinion of the Court of Appeals for the Second Circuit appended to that petition, which is officially reported at 354 F. 2d 428.

New York, Gruenenthal never sent any goods to the United States (P. App. 7, 31-32).*

Petitioner Heidi Harvey, while a native German citizen and a domiciliary of Germany, purchased in Germany from a German pharmacist, pursuant to prescription of a German physician, a drug known as "Contergan" manufactured and distributed by Gruenenthal in Germany (P. App. 24-25).

Subsequently, still in Europe, she met petitioner Tuck Harvey and became engaged to him. After he returned to the United States she joined him in New York. They were married in that state. Among the belongings she brought with her from Germany were some of the Contergan pills she had purchased there. She continued to use these tablets in New York after her marriage and during an ensuing pregnancy (P. App. 22, 24-25, 46).

Contergan contained thalidomide, a substance which some medical experts believe to be terratogenic.** Mrs. Harvey's pregnancy led to the birth of the two infant petitioners who are claimed to have substantial congenital deformities (P. App. 48).

In their complaint (P. App. 43-53), petitioners sought damages by reason of the alleged negligence of Gruenenthal in the manufacture of Contergan and on a warranty theory of product liability.

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* The petition asserts (8, 9, 15) that this licensee was also an "agent" of Gruenenthal. But the license agreement is in the record (P. App. 54-65). Its legal nature cannot be distorted. Its text negates all claims of agency and there is not a scintilla of evidence tending to show that the relationship was anything more than that arising from a routine patent license. In fact, the District Court so found (P. App. 2).

** The statement in Judge Waterman's opinion below (Op. 2a; 354 F. 2d 429) that thalidomide is "proven highly toxic" is erroneous and has no record support. Nor is it "proven," *i.e.*, established by scientific methods, that thalidomide is "dangerous to infants in foetus" (Op. 2a; 354 F. 2d 429).

Federal jurisdiction was asserted on the basis of diversity of citizenship (P. App. 43). According to the complaint "plaintiffs are citizens * * * of the United States and State of New York" (*ibid.*). The contention in the petition (2, 7) that this is not true as to petitioner Heidi Harvey is made *dehors* the record and therefore not available at this stage of the proceedings.*

In the District Court, petitioners sought to establish jurisdiction on two grounds: First, they contended that Gruenenthal committed a tortious act in New York, thus making applicable New York's "long-arm" statute [New York Civil Practice Law and Rules ("CPLR") section 302(a)(2)] (P. App. 43-44), which had become effective a few days before the commencement of the present action; and second, despite their prior admissions to the contrary, *supra*, p. 2, they claimed that Gruenenthal was "doing business within the State" (P. App. 44).

In granting petitioner's motion to dismiss for lack of jurisdiction, Judge Sugarman rejected both contentions. His decision was affirmed by the Court of Appeals for the Second Circuit in an opinion by Judge Waterman (Op.; 354 F. 2d 428).

After describing Gruenenthal's few isolated contacts with New York, the Second Circuit held that this "catalogue of irregular activity" (Op. 4a-5a; 354 F. 2d 430) did not amount to "doing business" under New York law:

> "The scattered activity of Chemie Grunenthal was not systematic and continuous; as the district judge correctly held, it cannot support a finding that the defendant company was present under pre-CPLR law." Op. 5a; 354 F. 2d 430-431.

It was equally clear to the court below that no jurisdiction could be predicated on New York's long-arm

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* Equally *dehors* the record are the references in the petition (2-3, 7) to proceedings which took place between the parties in Germany during the pendency of the instant litigation.

statute as authoritatively construed by the highest court of that state in an opinion disposing of three cases, one sounding in contract, *Longines-Wittnauer Watch Co., Inc.* v. *Barnes & Reinicke, Inc.*, and two sounding in tort, *Feathers* v. *McLucas* and *Singer* v. *Walker*, all reported at 15 N. Y. 2d 443 (1965).

In the two tort cases Gruenenthal had appeared as *amicus curiae* and outlined the facts involved in this proceeding in order to establish for the New York Court of Appeals its interest as *amicus*. Indeed, the briefing and hearing of the appeal in the instant case had been suspended to await decision in *Feathers* v. *McLucas* and *Singer* v. *Walker* so that the Second Circuit could have the benefit of the New York Court of Appeals' construction of the statute.

ARGUMENT

(1) In This Diversity Case the Court Below Properly Applied Local Law in Determining Whether There Was Jurisdiction Over the Person of the Defendant.

In cases, such as the present one, in which Federal jurisdiction exists only by reason of diversity of citizenship "the amenability of a foreign corporation to suit in a Federal court * * * is determined in accordance with the law of the state where the court sits." *Arrowsmith* v. *United Press International*, 320 F. 2d 219, 223 (2d Cir. 1963); A. L. I., *Study of the Division of Jurisdiction Between State and Federal Courts* (Tentative Draft No. 2) (1964), pp. 13, 77-79; (Proposed Final Draft No. 1) (1965), pp. 77-78.

All the Courts of Appeals which have passed on the point are in agreement with the Second Circuit's holding in *Arrowsmith, supra*, that *in personam* jurisdiction over

non-domiciliaries in diversity cases is to be determined in accordance with local law.*

(2) Respondent Was Not Amenable to Suit in New York Under CPLR Section 301.

CPLR section 301 (Pet. 5) preserves the prior New York law on jurisdiction over non-residents and foreign corporations.

New York's traditional test in this area is whether the defendant foreign corporation is engaged in such "continuous and systematic" local business activities as warrant a finding of corporate presence. *Simonson* v. *International Bank*, 14 N. Y. 2d 281, 285 (1964); *Miller* v. *Surf Properties, Inc.*, 4 N. Y. 2d 475 (1958); *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259 (1917); *Blount* v. *Peerless Chemicals (P.R.) Inc.*, 316 F. 2d 695 (2d Cir. 1963), *cert. denied*, 375 U. S. 831 (1963).

"Beyond peradventure," as Judge Waterman observed (Op. 4a; 354 F. 2d 430), Gruenenthal was not present in New York in accordance with this traditional test. Its "scattered activity" in New York between 1952 and 1961, involving dealings with New York patent counsel employed in proceedings before the Patent Office in Washington and possibly some incidents of a few patent licensing transactions, fall far short of the requirements of the New York law.

In any event, presence in the state at the time of service is controlling under New York law. *Conley* v. *Mathie-*

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* *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (1st Cir. 1948); *Partin* v. *Michaels Art Bronze Co.*, 202 F. 2d 541, 542-543 (3d Cir. 1953); *Stanga* v. *McCormick Shipping Corp.*, 268 F. 2d 544, 548 (5th Cir. 1959); *Smartt* v. *Coca-Cola Bottling Corp.*, 318 F. 2d 447, 448 (6th Cir. 1963); *Canvas Fabricators, Inc.* v. *William E. Hooper & Sons*, 199 F. 2d 485, 486 (7th Cir. 1952); *Simpkins* v. *Council Mfg. Corp.*, 332 F. 2d 733, 736 (8th Cir. 1964); *Walker* v. *General Features Corp.*, 319 F. 2d 583, 585 (10th Cir. 1963).

son Alkali Works, 190 U. S. 406 (1902); *Gaboury* v. *Central Vermont Ry. Co.,* 250 N. Y. 233 (1929); *DeClara* v. *Barber Lines, Inc.,* 277 App. Div. 1118 (2d Dep't 1950). Since 1961, hence long before the service herein, even this "scattered activity" had ceased (P. App. 4-8, 31-33).

It is not true that the jurisdictional standard of "a continuous and systematic course of business" applied by the court below is "discredited and inapplicable" (Pet. 11). On the contrary, this is the established and controlling standard under CPLR section 301.

(3) There Was No Jurisdiction Over Respondent Under CPLR Section 302.

CPLR section 302(a)(2) (Pet. 5) creates jurisdiction for actions arising out of the commission by the defendant in person or through an agent of a "tortious act within the state." By its very terms and as construed by New York's highest court it confers no jurisdiction over a foreign manufacturer because acts done by him without the state produce injurious consequences within the state. "The mere occurrence of the injury in this State certainly cannot serve to transmute an out-of-state tortious act into one committed here within the sense of the statutory wording." *Feathers* v. *McLucas, supra,* 15 N. Y. 2d 443, 460.

The New York Court of Appeals made it plain that the requirement of the commission of some act by the nondomiciliary defendant within the state cannot be satisfied by any legal sophistry. "The mere fact that a product defectively manufactured and misleadingly labeled in one state is marketed and sold in another cannot serve to change the place where the original tortious acts were committed or to create a new tortious act." *Singer* v. *Walker, supra,* 15 N. Y. 2d 443, 466.

The local law was thus expounded by the state's highest court with the facts of the instant case before it through Gruenenthal's brief *amicus*. Applying this law to the record before it presented no difficulty to the Second Circuit. No jurisdiction existed under CPLR section 302(a)(2) because Gruenenthal had not committed any "tortious act" in New York.

That language was not satisfied by "the in-state consequences of an out-of-state wrongful act, or the failure to warn persons within the state of the potential harm resulting from the earlier out-of-state wrongful act" (Op. 5a; 354 F. 2d 431).

The Second Circuit had no occasion to either construe or "misconstrue" (Pet. 3) the statute after the New York Court of Appeals had spoken. The argument that New York should have followed the interpretation placed upon similar language in Illinois (Pet. 4) is obviously out of place at the present stage of the proceedings. A similar contention had been made before the New York Court of Appeals and specifically rejected. *Feathers* v. *McLucas, supra,* 15 N. Y. 2d 443, 462-464.

CPLR section 302(a)(1) grants long-arm jurisdiction for causes of action arising from "transacting" business in New York. In certain cases out-of-state manufacturers soliciting business in New York and shipping their merchandise into that state may be amenable to jurisdiction in New York under CPLR section 302(a)(1) on claims arising out of the business so solicited.* But, as Judge Waterman pointed out, this basis of jurisdiction was not available here, "for the appellants' cause of action was not one 'arising from'" any activities of Gruenenthal within New York (Op. 7a; 354 F. 2d 431).

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* *Singer* v. *Walker, supra,* 15 N. Y. 2d 443, 464-467; *Lewin* v. *Boch Laundry Mach. Co.,* 16 N. Y. 2d 1070 (1965); *Johnson* v. *Equitable Life Assur. Soc'y of the U. S.,* 16 N. Y. 2d 1067 (1965).

None of Gruenenthal's "scattered" contacts with New York had anything to do with petitioners' claims. In fact, petitioners conceded before the Second Circuit that "the activities carried on in this forum by this foreign corporation were not directly connected with the tortious act committed herein" (Brief for plaintiff-appellants, p. 5).

While the majority opinion in *Longines-Wittnauer, Feathers* and *Singer, supra,* 15 N. Y. 2d 443, placed its decision solely on local grounds, Judge Van Voorhis mentioned in his concurrence that a broader interpretation of CPLR section 302 "would be likely to conflict with the Federal Constitution." 15 N. Y. 2d at 468.

Indeed, had New York construed its long-arm statute as authorizing jurisdiction over a non-domiciliary solely on the basis of forum consequences, it might well have come into conflict with constitutional limitations. *Hanson* v. *Denckla,* 357 U. S. 235 (1958); *Blount* v. *Peerless Chemicals (P.R.) Inc., supra,* 316 F. 2d 695 (2d Cir. 1963), *cert. denied,* 375 U.S. 831 (1963); *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.,* 239 F. 2d 502 (4th Cir. 1956); *Pendzimas* v. *Eastern Metal Products Corp.,* 218 F. Supp. 524 (D. Minn. 1961).

Certainly neither the legislature nor the courts of New York violated any constitutional rights of petitioners in stopping well short of asserting such dubious jurisdiction. *Perkins* v. *Benguet Consol. Mining Co.,* 342 U.S. 437, 440-441 (1952); *Missouri Pacific R. R. Co.* v. *Clarendon Boat Oar Co.,* 257 U. S. 533, 535 (1922); *Waltham Precision Instrument Co.* v. *McDonnell Aircraft Corp.,* 310 F. 2d 20, 23 (1st Cir. 1962); *Simpkins* v. *Council Mfg. Corp.,* 332 F. 2d 733, 736 (8th Cir. 1964); *Ark-La Feed & Fertilizer Co.* v. *Marco Chemical Co.,* 292 F. 2d 197, 200-201 (8th Cir. 1961).

Conclusion

The narrow jurisdictional issues presented in this case were correctly decided by both courts below. The view of the Second Circuit with respect to the controlling effect of local law is in harmony with the decisions on this point in all other circuits having passed on it. In essence, the petition merely attacks the construction which the highest court of New York has placed on the law of that state. Obviously, this construction of a local statute by the local courts is not open to challenge here.

The petition should be denied.

Dated: June, 1966.

Respectfully submitted,

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